No. 3[illegible]

In The

Supreme Court of the United States

October Term, 1963

OREST PANZA, FRANK SMITH, FRANK PANZA, STANLEY HALOVANIC, JOSEPH MALI, SAM LA CAVA and RALPH ZOERB,
Petitioners

vs.

ARMCO STEEL CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable Earl Warren, Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, Orest Panza, Frank Smith, Frank Panza, Stanley Halovanic, Joseph Mali, Sam La Cava and Ralph Zoerb, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on April 2, 1963.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania, printed in Appendix A (infra, pp. 49-59), is reported at 208 F. Supp. 50.[1] The opinion of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court, printed in Appendix A hereto (infra, pp. 60-62), is reported at 316 F. 2d 69.

JURISDICTION

The judgment of the Court of Appeals was entered on April 2, 1963 (infra, Appendix, p. 64). A petition for rehearing was denied on May 16, 1963 (infra, Appendix, p. 63). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. §1254(1).

[1] The appendix record was printed for the use of the Court of Appeals and appears in the form of the Appellants' Appendix and Appellee's Appendix. References to said Appendices are designated as "RP" (Appellants' Appendix) and "RD" (Appellee's Appendix), respectively. Nine (9) additional copies of said appendix record are submitted with the within petition pursuant to Rule 21 (4).

QUESTIONS PRESENTED

This is an action that raised the questions (a) whether employees have a "vested right" to their jobs when a plant, at which they have been employed for many years and in which they have gained seniority status, was merely moved from one geographical location to another within the same State and added on to another plant of the same employer, which manufactured a totally dissimilar product, but whose employees were represented by a separate local union, and (b) whether a District Court, in a prior action brought by an international union and local unions to enforce their seniority-recall rights upon the relocation of the plant, could order and compel the individual rights of the employees to be submitted to arbitration where said employees had not consented, either under the collective bargaining contracts involved or in the proceeding by the unions, to submit their seniority-recall rights to arbitration.

1. In *Textile Workers' Union v. Lincoln Mills*, 353 U. S. 448, the Court held that under Sec. 301(a) of the Labor-Management Relations Act, the rights of *unions* under collective bargaining contracts are federal rights for which the courts can fashion a federal law of collective bargaining contracts.

Whether the individual rights of employees under collective bargaining contracts to maintain an action for breach of their seniority and other vested rights under said contracts upon the relocation of the plant at which they were employed are also federal rights under Sec. 301-

(a) of the Labor-Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C., §185(a) (1952), for which federal law is to be fashioned?

2. Whether, under the federal law of collective bargaining contracts, seniority and other vested rights of employees, arising under such contracts, continue on the relocation of the employer's plant and facilities from one geographical location to another?

3. Whether, under the federal law of collective bargaining contracts, the question whether the seniority and other vested rights of the employees, arising under such contracts, continue to adhere to the plant in the event it is moved to a new location, where the employer also maintained and operated another plant manufacturing a totally dissimilar product, was a question that could be ordered submitted for arbitration under the grievance procedure of the contracts or one that the District Court could compel the parties to arbitrate?

4. Whether, under the federal law of collective bargaining contracts, the seniority and other vested rights of employees of one plant of an employer may be bargained away by such employer and an international union, which represents conflicting interests of local unions of which such employees are members, and of another local union, representing employees of another of the employer's plants to which the former plants and operations were moved?

5. Whether, under the federal law of collective bargaining contracts, in an action against an employer brought by an international union and two local unions, representing employees at one of employer's plants, to establish the seniority recall rights of said employees at another of the

employer's plants upon the relocation of such plant and facilities, the District Court had jurisdiction to compel, on the one hand, the employer and, on the other hand, the international union and the two local unions representing employees at the first plant and a local union representing the employees of the plant to which the old plant was removed, to submit to arbitration the issue whether, under their respective bargaining contracts, the employees at the old plant and the employees at the relocated plant were entitled to the jobs upon such relocation?

6. Whether, either under the federal law of collective bargaining contracts, or under the diversity jurisdiction of the District Court, Count II of the Complaint stated a claim for which relief can be granted, where it averred that the District Court, in a prior proceeding brought by the union, as opposed to the instant action brought by the employees, had compelled the local unions of both of employer's plants to submit the issue of seniority and other vested rights to arbitration, based upon the employer's wilful misstatement of the number of jobs that would be available upon the relocation of the plant and operations?

STATUTE INVOLVED

The statute involved is Section 301(a) of the Labor-Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C. §185(a) (1952):

> Section 301(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioners, citizens of Pennsylvania, formerly employees of respondent, instituted this class action, containing two causes of action, in the United States District Court for the Western District of Pennsylvania, against their former employer for damages (a) for breach of their vested seniority and other rights under certain collective bargaining agreements on the removal and relocation of one of respondent's plants and operations from one geographical area to another in Pennsylvania, and (b) for the respondent's fraud and deceit in wilfully and maliciously misrepresenting to the District Court, the labor unions involved and the arbitrator, in certain prior proceedings brought by an international union and local unions of which petitioners were members against respondent at Civil Action No. 61-10 in said District Court, that only 325 jobs would be available at the transplanted plant, on the basis of which statement a Submission Agreement, for arbitration was purportedly entered into and an Opinion and Award thereafter filed by an arbitrator. The jurisdiction of the District Court was based upon diversity of citizenship and amount in controversy (28 U.S.C.A. §1331).[2]

The respondent, Armco Steel Corporation, an Ohio corporation, with its principal office at Middletown, Ohio

[2] The District Court also had jurisdiction of this action by employees against their employer for damages resulting from alleged violation of collective bargaining agreements under the Labor Management Relations Act, 1947, §301(a), 29 U.S.C.A. §185(a): *Smith v. Evening News Association*, 371 U.S. 195, 83 S. Ct. 267 (1962).

(hereinafter called the "company" or the "employer"), was a manufacturer of steel products, with plants in the United States and abroad. Between 1823 and May 31, 1961, respondent and its predecessors, the Spang-Chalfant Company and the National Supply Company, operated a plant at Etna, Pennsylvania, known as its Etna Works, where it manufactured continuous welded pipe and electrical conduit. The respondent also operated and still operates a plant at Ambridge, Pennsylvania, known as its Ambridge Works, where it manufactures seamless tubular products.

Petitioners, who brought this class action on behalf of themselves and others similarly situated, are seven seniority employees who worked for the respondent at its Etna Works. They were members of Locals 1244 and 2592, which were affiliated with the United Steelworkers of America (hereinafter referred to as the "International Union"). There were 850 production and maintenance employees (members of Local 1244) actively employed at the Etna Works and 294 on layoff, as of January 17, 1961. There were also approximately 70 office and clerical employees (members of Local 2592) working and 5 laid off, of whom 32 were hourly rated clerks and 38 were salaried clerks. The length of plant service of Etna employees ranged from about 2 years to about 55 years, while their ages ranged from about 20 years to about 77 years. On the other hand, the Ambridge Works (to which the Etna operations, machinery, equipment and supervisory personnel and production were removed) normally employed about 2100 people. Approximately 528 employees were on a layoff status as of January 17, 1961. There was and is no clerical bargaining unit at the Ambridge Works; however, a substantial number of hourly-rated mill clerks are included in the production and maintenance bargaining unit.

Respondent's Movement of Its Continuous Welded Pipe and Electrical Conduit Operations From Etna, Pennsylvania to Ambridge, Pennsylvania: On November 15, 1960, respondent gave written notice to its Etna employees that it would shut down its Etna Works, department by department, starting on November 30, 1960 and ending on August 31, 1961, and that it would transfer the operations from Etna to Ambridge, but that it would not transfer any employees, except for certain supervisory employees, from Etna to Ambridge (Exhibit "D",[3] RP 47a-50a). On the same date, November 15, 1960, respondent notified its Ambridge employees that it was going to transfer the continuous welded pipe and electrical conduit operations from the Etna Plant to the Ambridge Plant starting December 1, 1960, department by department, and ending on August 31, 1961 (Exhibits "E" and "F", RP 51a-54a). In this notice to its Ambridge employees, respondent specified the dates on which the operations in each department at the Etna Works would be shut down and the dates when such departments would start up at its Ambridge Works.

The Collective Bargaining Agreements: Respondent had had separate collective bargaining agreements with Local 1244 (representing production and maintenance employees) and Local 2592 (representing clerical employees) for many years prior to 1960. On January 8, 1960, respondent and the USWA entered into a Basic Agreement covering the Etna Works for the period January 9, 1960 to June 30, 1962 (Exhibit "A", RP 22a-42a). On January 8, 1960 the respondent and the USWA and Local Union 1244 entered into a Seniority Supplement as a local agreement,

[3] References to "Exhibits" are to the Exhibits attached to the complaint.

supplementing the said Basic Agreement (Exhibit "C", RP 43a-47a). The National Supply Company (predecessor to respondent) and the USWA and Local 2592 entered into a Basic Agreement, effective January 4, 1960, terminating June 30, 1963, covering the clerical workers at the Etna Works and containing seniority provisions applicable to such employees. At or about the same date that respondent entered into the aforesaid Agreement, it also entered into other agreements covering pension, welfare and group insurance rights for its employees.

Each agreement contained a provision establishing a system of seniority which required that in the case of a curtailment of production, employees were to be laid off in the reverse order of seniority. Each agreement also contained a provision entitling the employees with proper seniority to be reemployed if the opportunity for reemployment for one having their seniority occurred within a certain number of years after their layoff. The contracts between the labor unions and the respondent employer also contained a non-contributory pension plan, with normal retirement on pension at age 65, and other types of pension under specified conditions. The contracts also included hospital, medical and surgical insurance, life insurance and accidental death insurance to be paid for by the employer.

Under the Basic Agreements and under the Local Seniority Supplement, only a local union representative designated for this purpose by the local union had authority to modify or change the vested property rights of the Etna employees under said agreements. Section 13.3 of the Basic Agreement provided that (RP 37a):

> "The existing seniority unit . . . covered by existing local agreements, shall remain in effect unless or

until modified by local written agreement signed by Management and a union representative designated for this purpose by the local union. Hereafter local seniority agreements including agreements covering departments or units thereof shall be signed on behalf of the Union by a union representative designated for such purpose by the local union."

Section 13.6 provided (RP 38a):

"Further provisions regarding seniority, applicable to each works, are set forth for each works in Local Agreements entitled 'Seniority Supplement'".

The foregoing provisions spell out the care with which the vested seniority rights of the Etna employees were to be protected. In short, the only method by which said rights could be changed or modified was by a local written agreement signed by management and by a union representative designated for this purpose by the local union. As shown hereinafter, the members of the local unions at Etna at no time authorized the appointment of a union representative "designated for this purpose".

Prior Action Brought by the Unions Against the Employer: At the time that the respondent announced its intention of closing the Etna Plant, a State Court action was brought in behalf of the United Steelworkers of America and Locals 1244 and 2592 and their district director against the respondent restraining it from repudiating the collective bargaining agreements between the parties by terminating and discharging the employees other than those transferred from Etna. Local 1360 had not been made a party to the State action.[4]

[4] Among the attorneys who filed this action on behalf of the plaintiffs was the Honorable Arthur D. Goldberg, now Justice of

The officers of Ambridge Local 1360 and its Director disagreed. They contended that employees who were laid off at Ambridge had superior rights to the new mill jobs and if any Etna employees were transferred to Ambridge it would have to be "in conformance with the existing Agreement and Seniority Supplements"—which meant they would have to go to the bottom of the seniority list. In view of this conflict, the Company refused to offer transfer rights to the Etna employees (RP 201a-202a).

The respondent, thereafter, removed the action to the District Court at Civil Action No. 61-10 and filed a motion to dismiss the action on the ground that the agreement between the parties provided for disposition of the question through arbitration. Thereupon, the District Court on January 10, 1961 ordered the parties, including Local 1360, to "endeavor to work out a satisfactory adjustment" and agreement as to the grievances which existed and to proceed to arbitration if a satisfactory settlement were not accomplished (RP 76a). Thereafter, the District Court on April 28, 1961 ordered the Ambridge Local 1360 to be added as a party plaintiff to the action and directed it to be a party to the arbitration (RP 78a, 202a).[5]

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this Court and then Chief Counsel for the International Union (RP 81a-92a). Petitioners submit that the International Union in the prior action recognized the seniority rights of the Etna employees to "follow their jobs", and that the International Union changed its views only when it was confronted with the claim by the Ambridge Local that its members were entitled to the jobs on the relocation of the Etna plant.

[5] Query: Did the District Court have jurisdiction under Section 301(a), 29 U.S.C.A. §185(a) to add Local 1360 as a party plaintiff—or even as a party defendant? By doing so, the District Court changed the action brought by the International Union and the Etna Local against Armco to a contest for the "transplanted jobs" between the Etna and Armco Locals.

As a preliminary to the court-directed negotiations, the three local unions and their directors were requested by the International Union President, David J. McDonald, to meet in order to develop a harmonious position with respect to the transfer of Etna employees. The local unions held fast to their initial positions, however, and no agreement was reached (RP 202a-203a). As a result, the International President appointed a three-member Commission of the International Executive Board of the Union to assist the locals in reconciling their differences and in developing a unified union position as a basis for the required negotiations with the company. However, the local unions refused to budge from their earlier positions. The Commission then stated it would itself attempt to develop an equitable solution (RP 203a).

Thereafter, the Commission, on its own initiative, worked out and proposed a plan for proportionate sharing of any additional job opportunities at Ambridge by the displaced Etna employees and the laid-off Ambridge employees (RP 203a). The plan and the Commission's Report and Recommendations were approved by the International Union Executive Board. The Commission was instructed to negotiate with the company for its recommended solution. At the same time, the local unions were directed to cooperate and assist in carrying out the decision of the Executive Board (RP 203a-204a).

At the first negotiating session which followed, Local 1360 refused to change its earlier position and withdrew from the meeting. But its staff representative remained and he and its district director participated in the negotiations with the company (RP 204a).

No agreement having been reached, Armco renewed its motion, and on April 28, 1961, the District Court ordered the parties "to immediately proceed to arbitration" (RP 172a-173a). Thereafter, arbitration proceedings were held before Harry H. Platt, Arbitrator, pursuant to a Submission Agreement executed by the defendant Armco and the plaintiff USWA by its counsel and purportedly by Local Unions 1244 and 2592 by their respective presidents (RP 174a-176a). *The said Submission Agreement was not approved by the members of either Local 1244 or 2592.* In addition, the Submission Agreement was not signed by Local Union 1360. The sole issue submitted to the Arbitrator was as follows (RP 175a):

"(1) There shall be submitted to . . . for decision the following question:

'Giving consideration to the interests of all persons and parties concerned and to the final proposals made by them during the negotiations which preceded the execution of the Submission Agreement, what is the most appropriate resolution of the dispute concerning the requested transfer of Etna employees to the Ambridge Works of the Company as the result of changes in operations?'

(2) The jurisdiction of the Arbitrator as conferred by this Agreement to determine the most appropriate resolution of the dispute shall include the determination of the interests and obligations of all the persons and parties concerned but shall be limited by all existing Agreements as they are or as they would be modified by the execution of the proposed Settlement Agreement."

Statement of the Case

This arbitration was purportedly pursuant to a special Submission Agreement dated April 20, 1961, signed on behalf of the International Union, USWA, by Elliott Bredhoff, of Feller, Bredhoff & Anker, General Counsel, and purportedly accepted by Local 1244 and by Local 2592 but not by the members of said locals, nor accepted by Local 1360, USWA, representing the employees of the Ambridge Works (RP 174a-176a).

The petitioners, as well as the individual members of the Etna local unions, vigorously opposed the execution of the Submission Agreement, as well as the subsequent arbitration proceeding itself (RP 91a-92a, Transcript of Arbitration Hearing of May 18, 1961, p. 38-40).

The District Court in referring the issue in the purported Submission Agreement for arbitration in essence directed the Arbitrator to adopt the recommendation of the Commission of the International Executive Board of the Union, which called for an award (Transcript of Proceedings at Civil Action No. 61-10 on April 10, 1961, RP 45a, 120a-121a, 149a-151a) of 206 of the estimated 325 jobs to the Etna employees and 119 of the jobs to Ambridge employees, and established procedures for integrating the seniority lists whereby those Etna employees who were hired lost the full seniority to which they were entitled.

The Arbitrator in his opinion recognized that the basis of his authority was the purported Submission Agreement dated April 20, 1961. He recognized that "This is not a grievance arbitration under a collective bargaining agreement which restricts the Arbitrator to interpreting and applying that Agreement" (RP 209a). The Dis-

trict Court in submitting the issue for arbitration in accordance with the Submission Agreement ignored the vested property rights of the plaintiffs under the Basic Agreements (RP 35a).

The District Court then dismissed, with prejudice, the action brought by the international union and the local unions at Civil Action 61-10.

The District Court in submitting the matter at Civil Action 61-10 to arbitration ignored (or its attention was not called to) the provisions in the Constitution of the International Union, USWA, adopted at Atlantic City, New Jersey, on September 22, 1960, governing the power or authority of its officers in connection with entering into collective bargaining agreements. Although the International Union may be authorized to represent its members as their agent as collective bargaining purposes and as their agent for processing grievances, the contractual powers of the International Union and of the officers of the International Union after a collective bargaining agreement has been executed are limited by Section 4 of Article XVII (Contracts), of the Constitution of the International Union, which provides:

> "Sec. 4. No officer, member, representative, or agent of the International Union or of any Local Union or of any subordinate body of the International Union shall have the power or authority to counsel, cause, initiate, participate in, or ratify any action which constitutes a breach of any collective bargaining contract duly entered into."

Once the International Union had acted as the collective bargaining agent for the members of the Etna locals,

it had no authority or power to modify the local seniority supplement without the authorization of the members of the Etna locals. The International Union, in short, did not have carte blanche authority to represent the individual members of the Etna locals.

Instant Action Brought by the Individual Employees: Therefore the petitioners instituted the instant class action for damages for breach of their individual rights under the collective bargaining agreements.

The second cause of action pleaded in the complaint is based upon respondent's fraud and deceit, in wilfully, maliciously and falsely representing to the International Union, as well as to the local unions involved and to the District Court and to the arbitrator in Civil Action No. 61-10, the number of jobs that would be available at the transplanted plant. In Paragraph No. 34 of the complaint (RP 15a-16a), petitioners allege:

> "34. That on information and belief, the defendant, since the closing of its operations at the Etna Works and the starting up of the same or similar operations at its Ambridge Works, first hired 325 employees (composed of 206 from its E[illegible]a Works with reduced seniority, and 119 from its Ambridge Works with their old seniority), then hired an additional 409 employees from its Ambridge layoff list with their old seniority, then approximately 45 new employees who had worked at either the Ambridge or Etna plants, and then hired approximately 45 from Etna with no seniority."

Petitioners thereafter allege that respondent knew that its misrepresentation of projected employment was false

and that respondent deliberately misled the District Court and the Arbitrator to act in reliance thereon in the arbitration proceeding and the arbitration award. Respondent's fraud in this respect constitutes a separate and distinct cause of action not raised in the arbitration proceeding (RP 18a-21a).

Action by the Courts Below in the Instant Case Brought by the Individual Employees: The District Court, Gourley, Chief Judge, acting upon respondent's motion to dismiss petitioner's class suit containing said two causes of action, recognized that petitioners as employees had acquired seniority rights that had been earned by compliance with the terms of the collective bargaining agreements, as well as other rights under the pension plan, welfare plan and group insurance plan, between the employer and the labor unions, that said rights had become vested and fundamental, and that said rights could not be unilaterally annulled by the movement of the factory where the petitioners were employed from one city to another (208 F. Supp. 50, 52). However, the District Court held, inter alia, that petitioner employees were not entitled to damages, even if the dispute were not arbitrable under the labor contract, because the question had been purportedly submitted to arbitrators by a special Submission Agreement between the employer and the International Union which represented the employees (208 F. Supp. 50).

The Court of Appeals affirmed the judgment of the District Court, stating that the second proceeding sought a relitigation of the same cause of action that was before the court in the first case and was adjudicated by a decision on the merits and, further, that the union which was

a plaintiff in the first action was the duly constituted representative of its members, including the present petitioners, and that their interest was subjected to the jurisdiction of the court in the first suit and was concluded by the dismissal of that action with prejudice (316 F. 2d 69).

REASONS FOR ALLOWANCE OF WRIT

In *Textile Workers' Union v. Lincoln Mills*, 353 U. S. 448 (1957), the Court instructed the lower courts to fashion a federal law of collective bargaining contracts to be applied to the rights and duties made federal by §301(a) of the Labor-Management Relations Act. In *Smith v. Evening News Assn.*, 371 U. S. 195, 83 S. Ct. 267 (1962), the Court ". . . removed the underpinnings of Westinghouse . . ."[9] by holding that a federal district court had jurisdiction of an action by an employee against an employer for damages resulting from alleged violation of a collective bargaining agreement. The Court therein makes it clear that when suit is brought by individual employees for violation of a collective bargaining agreement, federal rather than state law must be applied. The Court in the *Smith* case thereby recognized that: "The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of §301 has thus not survived . . ." (83 S. Ct. at 270). Since the coverage of §301(a) has been expanded by the decision in the *Smith* case, the Court is requested ". . . to fashion a body of federal law for the enforcement

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[9] *Association of Westinghouse Salaried Employees v. Westinghouse Corp.*, 348 U.S. 437.

of these collective bargaining agreements . . ." that would be applicable to the individual rights of employees thereunder under §301(a).

The Court in the *Lincoln Mills* case has held that §301(a) has substantive as distinguished from procedural intent and that Congress therein has directed the courts to formulate and apply federal law to suits for violation of collective bargaining contracts. As stated in *Lincoln Mills*, 353 U. S. 448, 456, 457: "There is no substantial difficulty" and "Section 301 is not to be given a narrow reading."

The Court has reviewed some general rules of collective bargaining contract interpretations fashioned by the district courts in response to the instruction of *Lincoln Mills*. Section 301 has been applied to suits to compel arbitration of such individual grievances as rates of pay, hours of work and wrongful discharge, *Textile Workers' Union v. Lincoln Mills*, supra, *General Electric Co. v. Local 205, UEW*, 353 U. S. 547; to obtain specific enforcement of an arbitrator's award ordering reinstatement and back pay to individual employees, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593; to recover wage increases in a contest over the validity of a collective bargaining contract, *Charles Dowd Box Co. v. Courtney*, 368 U. S. 502; and two suits against individual union members for violation of a no-strike clause contained in a collective bargaining agreement, *Atkinson v. St. Clair Refining Co.*, 370 U. S. 238.

Thus far, however, the review has reached general rules for only a few of the many provisions typically included in collective bargaining contracts—a review of a

number of rules of arbitration clause interpretation, one rule of welfare plan provision interpretation and two rules of no-strike clause interpretation. In this case, petitioners request the Court to review general rules of interpretation for one of the most basic provisions found in all collective bargaining contracts: the seniority provision.

All of the questions presented for this Court's consideration are of great practical significance because they arise out of a plant being relocated rather than being permanently shut down. Today the United States is experiencing a wave of such relocations, nearly all of which raise difficult socialological, economic, ethical and legal problems. It is important to employees, employers and unions that they have a clear idea of what their rights and duties are in these difficult situations.

The Court of Appeals in this case has held, in effect, (a) that employees covered by a collective bargaining agreement providing for seniority rights have no right to follow their jobs to a new geographical location when the employer merely relocates facilities and equipment of the plant where they had been employed; (b) that an employer and an international union, whose powers are restricted under an international constitution and which represents locals with conflicting interests at two plants of the employer, may agree between themselves to submit to arbitration whether petitioners, who had acquired seniority and other vested rights under collective bargaining agreements, were entitled to follow their jobs to the relocated plant; and (c) that under the aforesaid circumstances employees, who had lost their seniority and other vested rights to follow their jobs to the relocated plant as a result of the compulsory arbitration of said issue, were not

entitled to maintain an action against the employer for wilfully misrepresenting to the District Court in a prior action brought by the union the number of jobs that would be available at the transplanted plant.

This is a case of first impression in this Court. It involves the right of employees of one plant of an employer, who had acquired seniority and other rights under collective bargaining agreements as a result of many years of employment, to be entitled to the same job at another plant of the employer, where the employer, for economic or other reasons, merely moves the plant and its facilities to another geographical location and adds said plant and facilities onto another existing plant that it owns. The issue, as well as the issue concerning the authority of an international union to bargain away the vested rights of employees, is of the utmost importance today, not only to employees and their international union and local unions but also to their employers. This problem has arisen and will arise more frequently in the future whenever employers which have bound themselves under collective bargaining agreements move their plants and facilities from one geographical location to another either because of lower labor rates, lower rents or because the community to which they move their plants offers them certain financial inducements.[7]

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[7] E.g., 110 U. Pa. L. Rev. 458 (1962); Note, *Vested Rights in the Runaway Shop*, 13 W. Res. L. Rev. 360 (1962); Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 17 Harv. L. Rev. 1532 (1962); Lowden, *Survival of Seniority Rights Under Collective Bargaining Contracts; Zdanok v. Glidden Co.*, 48 Va. L. Rev. 201 (1962); Comment, 61 Colum. L. Rev. 1363 (1961); U. S. News & World Report, Dec. 21, 1959, p. 89; U. S. News & World Report, Aug. 7, 1961, p. 81; Commonweal,

This petition for writ of certiorari should be granted because:

1. *The rights and obligations in collective bargaining agreements involve federal substantive law.*

In *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957), in a suit by a union to compel arbitration of a grievance under §301 of the LMRA, 61 Stat. 156; Title 29 U.S.C. §185, it was stated by Mr. Justice Douglas at page 451 that that section

> "* * * authorized federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements. * * * Perhaps the leading decision representing that point of view is one rendered by Judge Wyzanski in Textile Workers Union v. American Thread (D.C. Mass.), 113 F. Supp. 137. That is our construction of §301(a). (§185 of 29 U.S.C.) * * *."

At page 456:

> "The question then is, what is the substantive law to be applied in suits under §301(a)? We conclude that the substantive law to apply in suits under §301(a) is federal law which the courts must fashion from the policy of our national labor laws."

This Court in *Smith v. Evening News Association*, 371 U. S. 195 (1962), held that federal district court had jurisdiction of an action by an employee against an employer for damages resulting from alleged violation of collective

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Sept. 22, 1961, p. 4; Krock, *Issue of Judicial Power to Rewrite Labor Contract*, N. Y. Times, Aug. 18, 1961, p. 20, col. 3; Krock, *Jobs as "Vested Rights" Despite Location Changes*, N. Y. Times, July 21, 1961.

bargaining agreement, although the alleged conduct of the employer was an unfair labor practice within the jurisdiction of the National Labor Relations Board. In the *Smith* case (83 S. Ct. 267, 270), this Court stated:

> "The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of §301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of §301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do."

This Court should grant a writ of certiorari in this case because there should be a definitive decision as to the authority of collective bargaining agents, especially the international union in this case, to bargain away the seniority rights of members of one local where there is a conflict between the interests of members of that local and the interests of members of another local union. In order to fashion a comprehensive pattern of rights, obligations and remedies under collective bargaining agreements, federal law should be looked to for the determination of the

rights and obligations under collective bargaining agreements relating to seniority, even when individual employees seek to enforce them. *Ingraham Co. v. Local 260 International Union of Electrical Workers, etc.*, 171 F. Supp. 103 (D.C. Conn. 1959); *New Bedford Defense Products Division, etc. v. Local 1113 of the International Union, etc.*, 160 F. Supp. 103 (D.C. Mass. 1958); aff'd 258 F. 2d 522 (C.A. 1st Cir., 1958)."

In *Ingraham* Judge Anderson stated:

> "If in dealing with cases of this kind, it were to be held that state and federal jurisdiction overlapped and that application could be made to either tribunal to apply its own law, an unnecessary jumble would result. Moreover, a controversy might well be determined by the relative fleetness of foot of the party running to the county courthouse for the application of state law as against the alacrity of the other party seeking to invoke federal law in the federal court."

As emphasized by Professor Archibald Cox in *Federalism in the law of Labor Relations*, 67 Har. L. Rev., page 1297 (1954), at page 1339:

> "It would create hopeless confusion to have one rule applicable to suits by a labor organization and another to suits by individuals. Uniformity could be achieved under a body of federal substantive law only by holding that the rules of decision developed by the federal courts were binding in state tribunals."

The question of the survival of seniority rights after a mere physical relocation by an employer of one of its plants and facilities to another geographical location where it maintains another plant, where it manufactures an en-

tirely dissimilar product, should be determined by this Court.

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2. *That the decision of the Court of Appeals is in conflict with the decisions of the United States Court of Appeals for the Second Circuit and also with the decisions of its own Circuit, each of which has held that employees having acquired seniority rights under collective bargaining agreements are entitled to follow their jobs upon the relocation of a plant and its facilities from one geographical location to another.*

The decision of the Court of Appeals is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *Zdanok v. Glidden Co.* (Cir. 2, 1961), 288 F. 2d 99. Cert. granted restricted to an inapplicable question, 368 U. S. 814, 82 S. Ct. 56, affirmed 82 S. Ct. 1459,[8] and with the decision of the Court of Appeals in the Third Circuit in *Metal Polishers, Buffers, Platers and Helpers International Union, Local 44, AFL-CIO v. Viking Equipment Co.* (Cir. 3, 1960), 278 F. 2d 142.

In the *Zdanok* case, former employees brought an action against their former employer for damages for the breach of seniority provisions of a collective bargaining agreement. The United States Court for the Southern District of New York (185 F. Supp. 441) held that the employees had no rights to seniority status under an expired collective agreement, and the employees appealed. The Court of Appeals, Madden, Judge of the United States Court of Claims, held that the judgment of a state court

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[8]Cf. *Livingston v. John Wiley & Sons* (Cir. 2, 1962), 313 F. 2d 52.

refusing to compel arbitration was not res adjudicata, and that the employees were entitled to enforce their seniority rights under the agreement, although it contained provisions for arbitration of disputes, and that the seniority rights were vested rights which were not lost when the agreement expired, that the employees had seniority rights after the employer transferred the plant from Elmhurst, New York, to Bethlehem, Pennsylvania, although the preamble of the agreement provided that it was made by the employer for its plant at Elmhurst. The Court of Appeals in the *Zdanok* case stated (288 F. 2d 99, 103):

> ". . . We think the plaintiff employees had, by the same token (by compliance with the terms of the contract) 'earned' their valuable unemployment insurance, and that their rights in it were 'vested' and could not be unilaterally annulled."

The decision of the Court of Appeals for the Third Circuit is in direct conflict with its own decision in the *Viking Equipment* case, supra. The *Viking Equipment* case involved an action by a union against an employer for money damages for breach of contract, for submission of a dispute to an impartial mediator in accordance with the terms of the contract, and to restrain the employer from entering into or continuing in effect an agreement with any other labor organization. From an adverse judgment of the United States District Court for the District of New Jersey, the union appealed. The Court of Appeals held that the collective bargaining contract between the union and the employer could not be interpreted as being applicable only to the employer's activities in a particular town in New Jersey and that the employer by its unilateral action in moving from one town in New Jersey to another

did not end such contract. The Third Circuit stated, 278 F. 2d at 142-143:

> "We do not think it is to be interpreted as applicable only to the defendant's activities in East Orange, New Jersey. And we do not think that the defendant brought it to an end by its unilateral action in moving from East Orange to Pennsauken."

There is a conflict among the decisions of the various Circuits concerning the seniority rights of employees upon a relocation of a plant and its facilities. In the *Zdanok* and *Viking Equipment* cases, the Second Circuit and Third Circuit have recognized that an employer cannot unilaterally terminate the rights of employees under collective bargaining contracts by merely moving a plant and its facilities from one location to another. In *Oddie v. Ross Gear and Tool Company, Inc.* (Cir. 6, 1962), 305 F. 2d 143, cert. den. 371 U.S. 941, the Sixth Circuit held a collective bargaining agreement which recognized the union as the exclusive representative of employees in an employer's plant or plants within Detroit city limits did not extend the employees' seniority rights to corresponding jobs in a new Tennessee plant to which the employer had moved the entire operation.

An important factor that was overlooked by the Court of Appeals in the instant case, as well as by the District Court in this case as well as in the prior proceeding, was that the petitioners claimed that the Etna plant had not been permanently shut down or integrated into the Ambridge plant but had been merely relocated.

The conflict between the Second Circuit in the *Zdanok* case and the Third Circuit in the *Viking Equipment* case

on the one hand, and the Sixth Circuit in the *Oddie* case on the other, should be resolved by this Court in the fashioning of a substantive federal law in an important area of the Federal Labor Law.

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3. *That the decision of the Court of Appeals in affirming the District Court's order that the issue of the seniority-recall rights of the petitioners be submitted to arbitration is in conflict with the decisions of this Court in the American Mfg. Co., Warrior and Enterprise cases.*

Arbitration is a matter of contract and a party cannot and should not be required to submit to arbitration any dispute which he has not agreed to submit: *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574.

Neither the labor unions nor the petitioners herein (the third party beneficiaries of the collective bargaining agreements) had contracted to refer such issue to arbitration. Even under the decisions in *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564 (1960), *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960), and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960), this Court recognized that judicial inquiry under 301(a), 29 U.S.C.A., must be strictly confined to the question whether the reluctant parties had agreed to arbitrate the issue. Herein the evidence is undisputed that the members as such of the local unions at the Etna Works never authorized the execution of the Submission Agreement or of the Settlement Agreement.

Judicial control is probably the keystone of success of the entire arbitral process. An arbitration proceeding must be subject to the scrutiny of the court either before arbitration takes place or upon the attempted enforcement of an award. Judge Cardozo in *Finesilver, Still & Moss, Inc. v. Goldberg, Maas & Co.*, 253 N. Y. 382, 389, 171 N.E. 579, 581 (1930), explained the underlying problem in the following terms:

> "Arbitration presupposes the existence of a contract to arbitrate. If a party to a controversy denies the existence of the contract and with it the jurisdiction of the irregular tribunal, the regular courts of justice must be open to him at some stage for the determination of the issue. The right to such a determination, either at the beginning or at the end of the arbitration or in resistance to an attempted enforcement of the award, is assured by the Constitution as part of its assurance of due processes of law."

The District Court in its Opinion dismissing the Complaint herein indirectly recognized that it might have been in error in its conclusion that, under the prevailing agreements as well as the Constitution of the International Union, the conflict properly could be relegated to arbitration (208 F. Supp. 50, 53; RP 68a-69a).

An examination of the provisions of Section 6 (Adjustment of Grievances) and Section 7 (Arbitration) of the Basic Agreements fails to justify the District Court's conclusion that the matter involved herein was arbitrable under said Agreements. The District Court clearly misconstrued what constitutes a "grievance" under the Agreements. The District Court stated that ". . . the Union agreement provides that any matter 'which involves

the interpretation or application of, or, compliance with, the provisions of this agreement' is a grievance under Section 6.3 . . ." (208 F. Supp. 50, 53). The District Court has taken the quoted language out of context. The applicable provisions of Section 6 pertaining to grievances are as follows (RP 24a):

"6.1 *Purpose*

The purpose of this Section is (1) to provide opportunity for discussion of any request or complaint, and (2) to establish procedures for the processing and settlement of grievances as defined in Subsection 6.3."

"6.2 *Discussion of Request or Complaint*

Any employee who believes that he has a justifiable request or complaint shall discuss the request or complaint with his foreman; with or without the department grievance or assistant department grievance committeeman being present, as he may elect, in an attempt to settle same."

"6.3 *Definition of Grievance*

'Grievance' as used in this Agreement is *limited to a complaint* which has not been settled as a result of the discussions required by Subsection 6.2 *and* which involves the interpretation or application of, or compliance with, the provisions of this Agreement." (Italics ours.)

Petitioners submit that a "grievance" as defined in Section 6.3 is not broad enough to include ". . . *any* matter which involves the interpretation or application of, or compliance with, the provisions of this agreement . . ."

On the contrary, "grievance" as used in said agreement, is *limited* to a complaint which has not been settled as a result of the discussions required by Subsection 6.2 *and* which involves the interpretation or application of, or compliance with, the provisions of said agreement. The issue of plaintiffs' vested property rights in their job most certainly was not contemplated or agreed to by the parties to constitute a "grievance" under Section 6.

Since the issue of petitioners' vested property rights in their job was not a "grievance" under Section 6.3, the provisions of Section 6.42 providing for arbitration upon inability of the parties to negotiate a grievance—a conclusion relied upon by the District Judge (208 F. Supp. 50, 53)—were not applicable. The District Court held that ". . . The latter arbitration clause (Section 6.42) does not exclude from arbitrable subjects either seniority or interplant transfers, and in the absence of any process provisions excluding a particular grievance from arbitration, only the most forceful evidence of a property to exclude the claim from arbitration can prevail . . ." (208 F. Supp. 50, 52). This conclusion by the District Court most certainly is not justified, for the arbitration clause (Section 6.42) is limited to the "Processing of Grievances" as defined in Section 6.3. The "grievance" to be adjusted by arbitration under Section 6.42 is ". . . limited to a complaint" which the employee shall first discuss and fail to settle with his foreman as required by Section 6.2 and involves the interpretation or application, or compliance with, the provisions of this Agreement. Petitioners submit that the arbitration clause (Section 6.42) relied upon by the District Court clearly was not intended to include the issue involved herein.

An analysis of Section 7 (Arbitration) of the Basic Agreements shows that the grievances arbitrable under said section are only those grievances referred to in Section 6.42, Step 4 of said Agreement. Section 7.1 (RP 13a) provides:

> "7.1 The arbitrator referred to in Section 6.42, Step 4 of this Agreement shall have jurisdiction and authority only to interpret, apply or determine compliance with the provisions of this Agreement and such local working conditions as may hereafter be in effect, insofar as shall be necessary to the determination of grievances appealed to the arbitrator. *The arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement.*" (Italics ours.)

The limitations set forth in the last sentence of Section 7.1 infers that only those grievances referred to in Section 6.42 shall be referred to the arbitrator and that all other disputes are excluded. Once the District Court recognized that the petitioners had vested rights in their jobs, the said Court had no authority to refer to an arbitrator under the Agreement the issue whether they had such vested rights. In doing so, the District Court—contrary to the provisions of Section 7.1—gave the arbitrator jurisdiction or authority to "add to, detract from or alter . . . the provisions of (said) Agreement." Petitioners submit that the reference of the issue of their vested rights in their jobs by the District Court to the arbitrator in the prior litigation was excluded by the provisions of the Agreement.

The dispute before the District Court in Civil Action No. 61-10 involved more than a grievance under said agree-

ments. The petitioners' right to follow their jobs upon the relocation of the plant went to the very heart of said agreements. The grievance and arbitration provisions in said agreements were never contemplated or intended to cover disputes of this nature.

An examination of the provisions of Section 6 (Adjustment of Grievances) and Section 7 (Arbitration) of the Basic Agreement shows that the scope of the arbitration clause was narrow and was not as broad as the arbitration clauses in the United States Supreme Court cases relied upon by Armco.

The arbitration clause in *United Steelworkers of America v. American Mfg. Co.*, 363 U. S. 564, provided (363 U. S. 564, at 566):

> "*Any disputes, misunderstandings, differences or grievances* arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision. * * *" (Italics ours.)

The arbitration clause in *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, provided (363 U. S. at 576-577):

> "'Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner (setting forth grievance procedure) . . .'"

The arbitration provision in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U. S. 593, provided, in part, at 363 U. S. at 595:

> "* * * It is understood and agreed that neither party will institute *civil suits or legal proceedings* against the other for alleged violation of any of the provisions of this labor contract; instead *all disputes* will be settled in the manner outlined in this Article III—Adjustment of Grievances.'" (Italics ours.)

In *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers International, AFL-CIO et al.*, 370 U. S. 254, 82 S. Ct. 1346, an action by an employer for damages for breach of a no-strike provision of a collective bargaining agreement, the Court affirmed an order of the Second Circuit staying the action until arbitration had been had. The arbitration provision therein contained the following broad language (82 S. Ct. 1348):

> "2. 'Article V—*Grievance Procedure*
>
> '(a) The parties agree that they will promptly attempt to adjust *all complaints, disputes or grievances* arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.'" (Italics ours.)

Petitioners contend that the parties cannot have intended to arbitrate so fundamental a matter as a breach of contract by Armco in failing to recognize the vested rights of the Etna employees in their jobs. Section 7 (Arbitration) of the Basic Agreement does not state that the adjustment and arbitration procedures are to apply to

all complaints, all disputes and all grievances involving any act of either party, or any conduct of either party, or any relief between the parties, directly or indirectly, but only to grievances as defined in Section 6.

In short, the District Court's ruling in Civil Action No. 61-10 violated the principle that ". . . (A) party cannot be required to submit to arbitration any dispute which he has not agreed so to submit": *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U. S. 574.

". . . The rationale behind the Steelworkers cases, supra, is that Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C.A., Section 185, requires Federal Courts to scrutinize the collective bargaining provisions relating to arbitration and to compel arbitration in all instances except where it is clear that the parties did not intend to commit their disputes in question to arbitration processes. Such was not the intent in the instant case. The collective bargaining agreements involved herein do not contain a "broad and comprehensive arbitration clause sufficient to require arbitration of any and all disputes such as the one involved herein". In reading the contracts as a whole, it seems clear that these contain more restrictive and more narrow arbitration provisions than those considered by, for example, the United States Supreme Court in *American, Warrior, Enterprise* and *Drake* cases.

This fact was recognized by the Arbitrator in his opinion, where he stated that ". . . without (the Submission Agreement) the Arbitrator would have no jurisdiction at all in this matter. This is not a grievance arbitration under a collective bargaining agreement which restricts the arbitrator to interpreting and applying that agreement." (RP 209a).

Nor did the purported Submission Agreement give the Arbitrator any jurisdiction to decide any of the issues submitted to him for, as heretofore shown in Appellants' Brief, the members of the Etna Locals never voluntarily agreed thereto. As stated in *Pirsig, Some Comments on Arbitration Legislation and the Uniform Act*, 10 Vand. L. Rev. 683, 693 (1957):

> "If arbitration is demanded of a dispute which does not fall within the terms of the agreement to arbitrate, the opposing party should not be compelled to submit to it. That is the core of voluntary arbitration."

The District Court in its Opinion recognized that it might have been in error in its conclusion that the issue of petitioners' vested property rights properly could be relegated to arbitration under the collective bargaining agreements. Otherwise there would have been no reason for the District Court's statement that ". . . arbitration, in the instant proceeding, stems from a Special Submission Agreement between the Company and the International Union, which called for the arbitrator to decide 'what is the most appropriate resolution of the dispute', signed for the International Union by its General Counsel and for the local unions by their Presidents" (208 F. Supp. 50, 53).

An examination of the proceedings in Civil Action No. 61-10 both before the District Court (RP 93a-173a) and before the arbitrator (RP 177a-200a) proves that neither the petitioners herein, nor the Etna Locals, voluntarily agreed to the submission of the issue involved herein to arbitration or that they voluntarily participated therein. Indicative of the compulsory nature of the arbi-

tration proceeding is the following excerpt from the transcript of April 10, 1961 in Civil Action No. 61-10 (RP 105a):

". . . The Court: Who is the attorney for these local unions that are telling their men not to go along? I would like to hear from that man and see what his reason and sense is.

Mr. Bredhoff: Your Honor, I don't—

The Court: Do they have local counsel?

Mr. Bredhoff: I do not believe either of (16) the local unions involved have retained separate counsel, to my knowledge.

The Court: I was told over the radio that a certain lawyer told the certain local to not sign this agreement. I would like that attorney to tell me that and why.

Mr. Bredhoff: That attorney that you are referring to, your Honor, has told the local union members, individual local union members, or groups of members, something along that line, but no—

The Court: If it doesn't respect its International, it should get out of the International Union. The way the United Steelworkers have tried to fight the battles of these men. My goodness, what they have done for me—

Mr. Buerger: If your Honor please—

The Court I worked in the steel mills and when you talked about unionism, you are fired. That only goes back to 1928."

Petitioners submit that they are not bound by the arbitration award because they had never agreed in any

of the collective bargaining agreements to arbitrate the issue of their vested seniority rights. As to the voluntary, dual-sided nature of arbitration, *Hoeltzel*, in "Federal Courts under Section 301", 43 Marq. L. Rev. 417, 430-431 (1960), comments:

> "Arbitration ceases to be voluntary when a party to an agreement is compelled to accept the decision of an arbitrator *over an issue which the parties did not either specifically or impliedly agree to submit to arbitration.* Arbitration under such circumstances, in effect, amounts to compulsory arbitration."

Petitioner-employees did not voluntarily consent to the arbitrator taking into consideration the recommendations of the International Commission for the prorating of jobs at the Ambridge Works between Etna and Ambridge employees. Nor did the petitioner-employees voluntarily consent to the submission to the arbitrator of the issue of ". . . the most appropriate resolution of the dispute concerning the requested transfer of Etna employees to the Ambridge Works of the company as a result of changes in operations . . ." The issue as submitted presupposed that petitioner-employees had no vested rights in said jobs.

At all times the members of the Etna Locals objected to both the execution of the Submission Agreement and to the subsequent arbitration. At a local union meeting held on March 15, 1961, the local union rejected the execution of the Submission Agreement. A letter dated March 16, 1961 from the Etna Local Unions to the President of the International Union explained the objections of the members (RP 91a-92a). At a meeting held in April or May, 1961, the local union officers advised the members that

they had been forced to submit to arbitration. Thereupon, the members of the locals voted to reject arbitration on the basis of the submission agreement and appointed a committee, including Mr. Panza and Mr. Smith, to attend the arbitration hearings solely for the purpose of protecting the rights of the individual members. At the arbitration hearings, J. Wray Connolly, who purported to represent the rank and file of the locals at the hearings before this Court, no longer represented the individual members of the local unions but purportedly acted on behalf of the local unions.

It is interesting to note that the Submission Agreement was executed on behalf of the International Union, not by any International officers, but by the attorneys for the International Union (RP 174a-176a).

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4. *That the decision of the Court of Appeals has determined questions of widespread importance involving federal substantive law which have not been but should be settled by this Court.*

This Court has never passed on the following questions: (1) whether the seniority rights and obligations acquired by employees of one plant of an employer by virtue of many years of service survive and continue after the relocation of such plant and its facilities to another plant owned by the same employer where entirely dissimilar products had been manufactured prior to such date, (2) whether the members of such local may be compelled by a district court to submit to arbitration the issue whether under such circumstances they were entitled to follow their jobs to the relocated plant where, under the collec-

tive bargaining agreement, they had not agreed to submit said issue to arbitration, and (3) whether such members were bound by the action of the International Union, which had been merely appointed their collective bargaining agent, in agreeing to submit to arbitration the issue of such seniority rights. Seniority provisions similar, if not identical, to the provisions contained in the instant collective bargaining agreements are contained in many collective bargaining agreements in industry. Under the interpretation of these provisions by the Court of Appeals has far-reaching consequences contrary to what has been known in the experience of management and labor with respect to such seniority rights, both factually and legally.

In *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1953) this Court stated at page 333 that it granted certiorari

> "* * * because of the widespread use of contractual provisions comparable to those before us and because of the general importance of the issue in relation to collective barg aining."

The novel interpretation by the Court of Appeals of petitioners' collective bargaining agreement with respondent will have far-reaching repercussions in the field of labor-management relations. Moreover, the interpretation is contrary to the judicial precedents in the Second and Third Circuits which have been accepted by both management and labor for many years. The interpretation of the Court of Appeals may well lead to drastic upheaval in the labor relations field.

Plant modernization and relocation brought on by rapid economic and technological changes occur frequently

in the present industrial growth of the country. It is of the utmost importance to settle the rights of employers, unions and employees involved in or committed to collective bargaining agreements which may now or hereafter contain similar provisions relating to seniority rights, and restricted to specific plants.

This suit is predicated on petitioners' employment rights arising out of the collective bargaining contracts involved. These contracts were for the petitioners' benefit. As third party beneficiaries to the labor contracts, petitioners' are entitled to sue the party who had wronged them. The purported "arbitration" relied upon by the respondent as a defense in this case was on its face a void thing, the product of a conspiracy between the respondent and the International Union to defraud petitioners of their rights arising out of the contracts. However, this suit is not predicated on the conspiracy between the employer and the Union but on petitioners' employment rights arising out of the labor contracts. Items such as the International Union and Armco submitting to arbitration and going into a pseudo arbitration with not even a pretense of permitting the members of the Etna Locals to present their position lend authentic atmosphere to petitioners' claims.

However, such items are not the causes of action. The foundation of Count I is the charge that Armco violated the labor contracts under which they had a duty to transfer the Etna employees to Ambridge upon relocation of the Etna Works. The recommendation of the International Commission, which was approved by Armco and adopted by the Arbitrator, deprived the petitioners of substantial rights. Such action made a mockery of the justice to all employees guaranteed by the labor contracts.

These petitioners should not be without remedy. They should not be estopped from asserting their claims by the purported arbitration proceeding. In any event, the federal substantive law would not and should not hamper this Court's power over such a void award as is shown by the prior litigation at Civil Action No. 61-10. The International Union could not validly make any recommendation or set up an integrated list for Ambridge employees on the layoff list and Etna employees to do the jobs that had formerly been performed at the Etna Works.

In the circumstances, there is no justification for forcing these petitioners to the ruinous step of suing their own union on these contract claims which are directed entirely at their former employer. Further, there is no justification for contending that petitioners' remedy was to attempt to persuade the International Union to set aside the Order at Civil Action No. 61-10—a vain move. The International Union and the Ambridge employees advanced over petitioners might be interested but they were not indispensable parties to this action. The only rights that have been taken away are those of the petitioners. As of now, the Ambridge employees involved are merely occupying petitioners' jobs.

The purported "arbitration" proceedings, as well as the prior litigation at Civil Action No. 61-10 deprived the petitioners of their vested property rights under the seniority provisions of the collective bargaining agreements here involved. The specific inequities that resulted to the petitioners in the various age categories are self-apparent. The petitioners who were particularly prejudiced by the "arbitration" award are those of the ages from 40 to 65, who were too old to obtain jobs elsewhere and too

young to retire, and also those above 65, who were compelled to retire on pension. By virtue of the "arbitration" award, the Ambridge employees, who prior to the events here involved had never performed the work formerly done by the Etna employees at the Etna Works, were given job opportunities which they had not had before. Further, under the "arbitration" award, the 206 former Etna employees who were placed on the Ambridge layoff list with reduced seniority status were not transferred to do the jobs they had formerly performed at the Etna Works but were integrated into the overall Ambridge layoff list. Many of said 206 employees will be among the first to be laid off in the event of a reduction in production at the Ambridge Works. This is a factor which most certainly was not called to the attention of this Court in the hearings in Civil Action No. 61-10.

The district court, in effect, recognized that the Etna employees owned vested property rights in their jobs, but held that the employees, or their authorized union agent, had bargained away the employees' vested property rights. Petitioners submit that they had never bargained away their rights to follow these jobs and that they had never authorized either the International Union or the local union to do so. Even after the "arbitration" award, Armco recognized that the Etna employees had not bargained away their rights to follow these jobs by inserting the following waiver in form entitled "Election by Etna Employee Eligible for Transfer to the Ambridge Works", prepared pursuant to the Agreement dated June 9, 1961: "... I shall waive . . . (b) any other rights which otherwise might accrue to me if I were an employee laid off or terminated from the Etna Works." (R1' 233a-234a)

Query: If under clause (a) of said Election said employee waived severance pay allowable under Section 16, what other rights did he have to waive under clause (b) other than the right to follow his job?

It is paradoxical that the International Union, which authorized the filing of the prior litigation in the Court of Common Pleas of Allegheny County, Pennsylvania, first agreed with the contention of the Etna locals that they had vested property rights in their jobs and the right to follow their jobs upon the removal of the plant (RP. 81a-90a), and then later arbitrarily changed its position and recommended that a number of the Etna employees be placed on the Ambridge layoff list. In Paragraph Tenth of the complaint filed in the state court, the International Union agreed that the seniority provisions were inserted in the labor contracts ". . . expressly for the purpose of insuring job security for the employees at the Etna plant in anticipation of the job shutdown of the said plant and the transfer of their jobs to a new plant . . ." In Paragraphs Twelfth and Thirteenth of the same complaint, the International Union charged that Armco's actions in terminating and discharging the Etna employees, "in deliberate violation of its obligations under the Labor Agreement", ". . . (deprived) them (the Etna employees) of valuable property rights in their jobs, (etc.) . . ." The only purpose of the International Union in seeking a preliminary mandatory injunction in the state court was ". . . for the purpose of discussing and arranging the transfer of the employees from their jobs in the Etna plant to the same or similar jobs in the new Ambridge plant, or to newly created jobs in the new Ambridge plant, replacing their jobs in the Etna plant and

for the purpose of adjusting all problems arising out of the transfer of said employees." This complaint was filed on behalf of the International Union by Arthur J. Goldberg, then its General Counsel, and Elliott Bredhoff, as well as local counsel of the International Union and of District 19 (RP 90a). Again, it must be pointed out that Mr. Bredhoff shifted his original position as set forth in the complaint after the prior action was transferred to the district court and agreed with the recommendation of the International Commission.

The International Union made no explanation for the foregoing change of position. The result of said change of position was that the International Union favored the politically powerful Ambridge local as against the Etna locals and worked out a recommendation that was acceptable both to the company and to the Ambridge local. After all, the Ambridge local had no cause to complain; its members were given job opportunities which they never enjoyed before the removal of the Etna Works to Ambridge; the 206 former Etna employees who were placed on the Ambridge integrated layoff list lost a substantial amount of their seniority and will be among the first to be laid off in the event of curtailment of production at the Ambridge Works; and whenever full production is reached at Ambridge, hiring for the transplanted Etna Works will be by the Ambridge local from new applicants and not from Etna employees who had devoted many, many years of their lives working for Armco.

The petitioners submit that the complaint in Counts I and II set forth two claims for relief under which they were entitled to establish that the processes of the district court have been used to defraud them of their vested

property rights in their jobs upon the removal of the Etna Works to Ambridge. They are not estopped by the "arbitration" from asserting their two separate claims against this respondent, wherein parties to an action (here the International Union and the employer) contrived by the entry of a judgment therein or by a purported "arbitration" proceeding therein to defeat the rights of third persons (the Etna employees). The judgment does not and should not act as a bar against the claims of the persons defrauded and is subject to collateral attack: cf. *Hogell v. Franke*, 353 Pa. 440, 442.

The issues involved in this case are most serious. The Court's decision will affect the lives and welfare of approximately 1200 former employees at Armco's Etna plant and their families. At the core of this case was Armco's cavalier "scrapping" of these "senior employees" by the device or scheme of relocating the plant, equipment and operations from one geographical location to another. Petitioners are entitled to have a trial on the merits of their claims for relief under Count I and also under Count II. At this trial they will be able for the first time to show that their individual rights have been violated by Armco and also to show that Armco wilfully and maliciously misrepresented material facts to the district court and to the arbitrator. At the trial the petitioners will be able to establish the validity of their claims without interference by the International Union, which, no matter how good its intentions were, represented conflicting interests. At this trial they will not be confronted at the outset with a prejudged decision—the recommendation of the International Commission that was adopted by the arbitrator. In short, justice requires a trial on the merits.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners.

Dated: August , 1963.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 62-284

Orest Panza, Frank Smith, Frank Panza, Stanley Halovanic, Joseph Mali, Sam La Cava, and Ralph Zoerb,

Plaintiffs

v.

Armco Steel Corporation,

Defendant

OPINION

Wallace S. Gourley, Chief Judge

This matter comes before the Court on defendant's motion to dismiss plaintiffs' class suit containing two causes of action:

1. To recover damages for breach of plaintiffs' seniority rights under certain collective bargaining agreements on the shutting down and movement of certain of defendant's plant facilities from Etna to Ambridge, Pennsylvania.

2. To recover damages based upon defendant's alleged fraud in misrepresenting certain material facts to the Labor Union and the District Court.

HISTORY

In order to view the motion in its proper perspective, it is incumbent to review the history of all proceedings which give rise to the present dispute. Since this member of the Court disposed of all matters which related to the controversy since the date that the United States District Court first assumed jurisdiction, I am personally familiar with all the facets and ramifications of the dispute which involved innumerable hours of extra-judicial negotiation and discussion.

The seeds of the controversy are planted, nurtured and cultivated in the soil of automation and glaringly demonstrates the ruthless toll which automation, as a necessary concomitant to industrial progress, is taking in the stark, bleak reality of loss of livelihoods among so many of our industrial employees.

The lawsuit is the culmination of the defendant steel company, which has plants at both Etna and Ambridge, Pennsylvania, closing the Etna plant and constructing a new, modern combination pipe mill as an adjunct to the Ambridge plant.

The closing of the Etna plant was precipitated by its antiquated condition and the inability to operate it profitably. For many years the Etna plant manufactured welded pipe and electrical conduit, and was capable of producing a small range of pipe sizes at only moderate speeds. The decision was therefore made to install a modern combina-

tion pipe mill at Ambridge, where the new mill and facilities would be integrated into the Ambridge operations.

The employment dislocation is glaringly brought into focus in the realization that 328 men employed with the new and modern equipment are producing the equivalent of the same product for which 850 men were employed at Etna.

At the time that defendant announced its intention of closing the Etna plant, a State Court action was brought in behalf of the United Steelworkers of America by its Locals Nos. 1244 and 2592, and their District Director against the defendant from repudiating collective bargaining agreements between the parties by terminating and discharging the members in the Etna plant of the defendant company and from filling any new job created in Ambridge as a result of the new facilities with members other than those transferred from Etna.

Subsequently, defendant removed the action to this Court at Civil Action No. 61-10[1] and filed a motion to dismiss the action on the ground that the agreement between the parties provided for disposition of the question through arbitration.

Thereupon, this member of the Court, after a most extended and protracted argument, ordered the parties to negotiate in an attempt to settle their differences and to proceed to arbitration if a satisfactory settlement was not accomplished.

---

[1] The records of Civil Action 61-10 are crucial to an appreciation of the issues herein presented and accordingly are incorporated as part of the record of this proceeding.

As a preliminary to the Court's directed negotiation, the three local unions and their directors were requested by the International Union President, David J. McDonald, to meet in order to develop a harmonious position with respect to the transfer of the Etna employees. In this connection, the extraordinary and conscientious efforts which Mr. McDonald extended in solving a tragic dilemma brought on as a by-product of industrial progress is a tribute and example of dedicated, responsible and competent union leadership.

The International President selected a three-member commission of the International Executive Board of the Union to assist the locals in reconciling their differences and in developing a unified union position as a basis for the required negotiations with the company.

Despite the Commission's earnest efforts to persuade them otherwise, the local unions refused to budge from their earlier positions.

The Commission, thereupon, on its own volition, made an intensive study of the divers facets of the seniority rights of the parties, and after conducting extensive hearings, submitted a proposed plan which was approved by the International Union Executive Board, and the Commission was instructed to negotiate with the company for its recommended solution.

Nevertheless, the Ambridge Union refused to officially participate, and the company, as a matter of industrial relations policy, preferred not to execute the proposed Settlement Agreement.

In view of the hopeless stalemate which existed, and the willingness of the Etna Locals and the International

Union to accede to arbitration, the Court recognized arbitration as the only reasonable solution to an otherwise insurmountable industrial conflict which, if unresolved, would have left in its wake the scars of continuing labor strife and industrial dislocation.

It is noteworthy and extremely significant that the officers of Locals 1244 and 2592 of the Etna plant and their Director initiated the proceeding, never appealed from the Court's directive that they proceed to arbitration, and such arbitration was conducted on the basis of a Submission Agreement between the Commission and the International Union.[2] Etna Locals 1244 and 2592 accepted the agreement and participated in the arbitration, and the Ambridge Local, which failed in its appeal from this Court's order that it also participate in the arbitration, was also present and participated.

VESTED RIGHTS OF EMPLOYEES

Plaintiffs' first cause of action is grounded on the thesis that as employees they had acquired seniority rights that had been earned by compliance with the terms of the collective bargaining agreements, as well as other rights under the pension plan, welfare plan and group insurance plan between an employer and a labor union, which had become vested and fundamental, and that such rights could not be unilaterally annulled by the movement of the factory where the plaintiffs were employed from one city to another.

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[2] The Submission Agreement which was the basis upon which arbitration was conducted is attached hereto and incorporated as a part of this Opinion.

In support of their position, plaintiffs place great reliance on a recent decision of this Circuit. Metal Polishers, Platers and Helpers Int. Union, Local 44, v. Viking Equipment Co., 278 F. 2d 142 (3 Cir.); Zdanok v. Glidden Co., 288 F. 2d 99 (2 Cir.).

The conclusions enunciated in both cases, in my judgment, are basically sound and conclusively supportable by the facts which give rise to the legal question presented. I heartily endorse the view, which is not contested in this proceeding, that seniority rights of employees, together with similar rights adverted to, are fundamental and vested, and are not to be annulled and obliterated by the simple expedient of moving a plant from one area to another.

I am extremely mindful of these vested rights, together with the expenditure of limitless human resources which they represent, having noted the many years of dedicated service and labor which have been rendered by the plaintiff employees in behalf of the defendant company.

The factual circumstances of the plant transfer, however, render these authorities inapplicable. In the cases cited, an actual transplanting of plant facilities from one area to another occurred, so that the vested employees' rights attached and were rightfully preserved.

As to the Etna plant herein involved, only a small amount of Etna equipment, or less than 20 per cent, was moved. True, the new mill at Ambridge produces the same end-product as the old mill, that is, continuous weld pipe. But the new plant at Ambridge accomplishes considerably more by producing a continuous weld pipe and

electrical weld steel pipe at speeds almost four times as great as before, and is capable of stretch-reducing welded pipe to final size and seamless pipe to smaller sizes, producing a wider range of pipe sizes and performing processes never before performed at either Etna or Ambridge. There is no segregation of the new Ambridge facilities from the existing plant. In actual fact, the new facilities were integrated into the existing Ambridge operation and the Etna functions became indistinguishable from the Ambridge functions. The transfer at most, therefore, constituted an integration of part of the Etna facilities with the Ambridge plant, so that Etna, by and large, experienced a shut-down of its plant and not a transplanting or transfer.

As to which employees, those of the Etna or Ambridge Locals, would acquire these jobs created a non-negotiable conflict peculiarly indiginous to arbitration since both the Etna and Ambridge Locals claimed all of the jobs.

In this connection, plaintiffs reject arbitration despite their active participation in the proceedings and agreement by their counsel to so participate, suggesting that the Agreement together with the Constitution of the International Union did not authorize the relegation of a dispute to arbitration where vested rights were in the balance.

Article XVII, Section 1, of the Constitution of the United Steelworkers of America provides that the International Union shall be the contracting party. Article XVII, Section 3, provides that the members have delegated to the Union the power to act exclusively to represent

them in all matters arising out of the employer-employee relationship.

The Union agreement provides that any matter "which involves the interpretation or application of, or compliance with, the provisions of this agreement" is a grievance under Section 6.3, while Section 6.42 provides for arbitration upon inability of the parties to negotiate a grievance. The latter arbitration clause does not exclude from arbitrable subjects either seniority or interplant transfers, and in the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U. S. 574.

Assuming I were in error, however, in my conclusion that under the prevailing agreement as well as the Constitution of the International Union, the conflict properly could be relegated to arbitration, another cogent and indefeasible reason exists why the assignment of the dispute to arbitration was proper and in accordance with law.

Aside from the collective bargaining agreement which provided for arbitration of grievances between the Company and the Locals, arbitration, in the instant proceeding, stems from a Special Submission Agreement between the Company and the International Union, which called for the arbitrator to decide "what is the most appropriate resolution of the dispute," signed for the International Union by its General Counsel and for the local unions by their Presidents.

The International and the Etna Locals appeared as parties in the hearing before the arbitrator with the In-

ternational and the Etna Locals being represented by separate counsel. The Ambridge Local, which is not a party to this action, did not participate although an observer was present. The Etna Locals presented witnesses and cross-examined adversary witnesses.

The identical issue which confronted the Court in the first instance, as to whether the Etna employees had a right to follow their jobs to Ambridge, was the specific issue presented by the Etna locals to the arbitrator.

The arbitrator concluded that a settlement worked out by the International Union and the Company, which called for granting 206 jobs to the Etna employees, was a most appropriate solution, making available to them rights which they would not be entitled to under existing agreements.

The Company and the International Union, acting on behalf of itself and the Local Unions Nos. 1360, 1244 and 2592, on June 9, 1961, entered into an agreement putting into effect the arbitration award.

Whereupon the International and the Locals stipulated for dismissal with prejudice of the proceeding originally pending in this Court, which Order was approved on September 12, 1961.

The law appears well settled that rights of individual employees can be bargained away by the union representing them in collective bargaining. Zdanok v. Glidden Company, supra; Oddie v. Ross Gear & Tool Co., (6 Cir.), decided July 16, 1962, officially unreported. Having voluntarily submitted to arbitration through their duly constituted representatives, I find no basis upon which dis-

satisfied individual constituent employees can attack an arbitration award in conformity with law and equity.

ISSUE OF FRAUD

Plaintiffs' second cause of action is predicated upon the contention that the arbitration adjudication should be annulled for the reason that the company perpetrated a fraud at the arbitration hearing in misrepresenting the number of jobs which would be available at the new plant at Ambridge.

An arbitration award, unless and until invalidated, creates or authoritatively declares rights even as a judgment does. Nix v. Spector Freight System, Inc., 264 F. 2d 875 (3 Cir.).

A judgment may not be set aside collaterally even if founded on perjured evidence when the matter was actually presented and considered in the judgment assailed. United States v. Throckmorton, 98 U. S. 61, 66. If the judgment is for the defendant, it operates as a bar to a subsequent action by the plaintiff upon the original cause of action, even though the judgment is erroneous, Restatement of the Law of Judgments, Section 45(f). The doctrine of collateral estoppel makes the 1961 proceeding conclusive as to any essential fact or question, Vauderveer v. Erie Malleable Inran Co., 238 F. 2d 510, 512 (3 Cir.).

Construing all facts and allegations in the plaintiffs' complaint as true and correct, no basis exists in law upon which the instant class suit is maintainable and defendant's motion to dismiss the complaint will be granted.

An appropriate order is entered.

ORDER

And Now, This 22nd day of August, 1962, motion of defendant, Armco Steel Corporation, to dismiss the complaint will be and hereby is granted.

The United States Clerk of Courts is hereby directed to dismiss the above proceeding from the docket of this court.

(s) WALLACE S. GOURLEY, CDJ
Chief Judge

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 14,190

Orest Panza, Frank Smith, Frank Panza, Stanley Halovanic, Joseph Mali, Sam La Cava and Ralph Zoerb,

Appellants

v.

Armco Steel Corporation

Appeal from the United States District Court for the Western District of Pennsylvania

---

Argued March 19, 1963

Before: Hastie, Ganey and Smith, *Circuit Judges*

OPINION OF THE COURT

(Filed April 2, 1963)

Per Curiam:

This is the second of two actions, both litigated in the District Court for the Western District of Pennsylvania, seeking essentially the same relief. The present plaintiffs are members of a local union which, together with a sister

local and their parent international, brought the first suit as collective bargaining representatives of the members of the locals, complaining that the defendant employer, Armco Steel Corp., had unlawfully failed to respect the seniority of the members of the locals in connection with the transfer of employees *from a discontinued plant to a a new one*. It was alleged that the employer had violated a master collective bargaining agreement and a local supplement covering seniority rights. The district court ordered the arbitration of this matter and the arbitrators' ultimate award, giving the membership of the local some relief but less than they sought, was complied with by the employer. The district court then dismissed the action with prejudice.

Now, certain dissatisfied members of the local, suing for themselves and their fellow members, have brought this second action against Armco Steel Corp. seeking damages for the employer's failure to grant those rights of employment and status in the new plant that were asserted and litigated in the earlier suit. It is again asserted that the employer has violated rights conferred by the master collective bargaining agreement and the local seniority supplement.

The plaintiffs do not claim that they were unaware of the earlier litigation. Indeed, it appears that one or more of them actively participated in the hearing before the arbitrator. They do assert that the reference to arbitration in the first action was unwarranted and illegal and that the outcome of the arbitration was affected by fraudulent representations made to the arbitrator.

The district court dismissed this action on the employer's motion averring that the matter in controversy was res judicata.

The action of the district court was clearly correct. The second proceeding seeks a relitigation of the same cause of action that was before the court in the first case and was adjudicated by a decision on the merits. It is also clear in the record that the union which was a plaintiff in the first action was the duly constituted representative of its members, including the present plaintiffs. Their interest was subjected to the jurisdiction of the court in the first suit and was concluded by the dismissal of that action with prejudice.

The judgment will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 14,190

Orest Panza, Frank Smith, Frank Panza, Stanley Halovanic, Joseph Mali, Sam La Cava and Ralph Zoerb,

Appellants

v.

Armco Steel Corporation

SUR PETITION FOR REHEARING

Present: Hastie, Ganey and Smith, *Circuit Judges*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court,

WILLIAM H. HASTIE,
Circuit Judge

Dated: May 16, 1963

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 14,190

Orest Panza, Frank Smith, Frank Panza, Stanley Halovanic, Joseph Mali, Sam La Cava and Ralph Zoerb,

Appellants

vs.

Armco Steel Corporation

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: Hastie, Ganey and Smith, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of August 22, 1962 of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk

April 2, 1963

SEP 10 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 371

OREST PANZA et al., Petitioners

v.

ARMCO STEEL CORPORATION, Respondent

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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Argument

I. There is no question of federal law applicable to this case which has not been settled by this Court. It is thoroughly settled that: 8

(a) A question put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies.

(b) A collective bargaining representative acting in good faith has continuing authority to negotiate agreements affecting seniority.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 371

OREST PANZA et al., Petitioners

v.

ARMCO STEEL CORPORATION, Respondent

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. A labor union, acting on behalf of its members, sued an employer for damages from an alleged breach of a collective bargaining agreement. The action was dismissed with prejudice. May individual employees, acting on behalf of the union members, thereafter sue the employer for damages from the same alleged breach of the same agreement?

2. An international union, the exclusive collective bargaining agent, agreed to arbitration proceedings which resulted in improving the seniority of some of its

members and adversely affecting the seniority of others. Did the international union exceed its authority?

3. A collective bargaining agreement provided that a complaint not settled should become a grievance, and that any grievance not settled should be arbitrated. The union and the employer agreed to arbitrate a grievance as to whether employees had a right to be transferred to another plant. The arbitrator held that the employees had no such right. May individual employees, acting on behalf of the union members, thereafter sue the employer for damages from the refusal to transfer employees?

STATEMENT OF THE CASE

On December 29, 1960, an action was brought against Armco Steel Corporation in the Court of Common Pleas of Allegheny County, Pennsylvania (81a). The plaintiffs were the United Steelworkers of America and its local unions Nos. 1244 and 2592. The complaint in this first action alleged that the United Steelworkers of America was the exclusive collective bargaining representative, certified by the National Labor Relations Board, for Armco's production, maintenance, and office workers at its plant in Etna, Pennsylvania (82a). The complaint alleged that Armco intended to close its Etna plant and terminate the employees represented by the plaintiffs (85a-86a). The complaint referred to paragraphs in the collective bargaining agreement between United Steelworkers and Armco and in a "seniority supplement" thereto which provided that problems arising out of the transfer of employees from discontinued plants to new plants were matters for which adjust-

ment should be sought between local plant management and local grievance committees (85a).

Then the complaint in the first action alleged that Armco, in breach of the paragraphs in the collective bargaining agreement and the seniority supplement, refused to transfer to Ambridge, Pennsylvania, the Etna employees represented by the plaintiffs, and that these employees had the right to be transferred to the same or similar jobs in Ambridge. The complaint asked that Armco be enjoined from terminating the employees at Etna, that it be required to transfer the Etna employees to Ambridge, and that it be ordered to pay compensatory and punitive damages (89a-90a).

On January 6, 1961, Armco removed this first action to the District Court for the Western District of Pennsylvania, and on January 9 filed a motion to dismiss the action on the ground that the agreement between the parties provided for disposition of the question through arbitration (75a-76a). On April 11 the Court ordered the parties "to immediately proceed to arbitration" (78a). This order included Local Union No. 1360, which represented the Ambridge employees and which had vigorously opposed the transfer of Etna employees to Ambridge (78a).

On May 18, 1961, arbitration proceedings began before Arbitrator Harry H. Platt pursuant to agreement of the defendant Armco and the plaintiffs United Steelworkers of America and its local unions Nos. 1244 and 2592 (174a-176). All parties were represented by counsel before Mr. Platt (177a) and the hearing took two days. Questions were raised as to the probable number of additional employees needed at Ambridge to operate

the enlarged facilities, and the Armco Vice-President estimated the number at 325, although he stated that to some extent this would probably be a guess (1b-5b). The estimate of 325 was based on a market forecast of the number of tons of product expected to be produced over the next five years (206a).

On June 7, 1961, Arbitrator Platt rendered his award (201a-232a). First he rejected the contention of the Etna locals that the paragraphs above referred to in the collective bargaining agreement and the seniority supplement entitled the Etna employees to the jobs at Ambridge. He held (213a-214a):

> "The above language certainly cannot be read as 'guaranteeing a right of transfer' to anyone. All it does is recognize that when new plant or department capacities are added or expanded it may be necessary or desirable to transfer employees from old plants to new plants or newly expanded departments or necessary or desirable to retransfer employees from the new to their old plants or departments or from discontinued departments or plants to new plants or departments. Should any of those events occur, the parties are agreed that problems arising out of the transfer of employees are matters which the local managements and the local grievance committees will attempt to adjust. This includes questions of whether, who, or upon what conditions employees will be transferred. The clause does not give to employees in a discontinued plant any other rights than the right to bargain for a transfer to or retransfer from a new plant or department or discontinued plant or department."

Among the documents introduced in evidence at the arbitration hearings which supported the conclusion of Mr. Platt were:

(a) the statement of Union President Philip Murray in 1945, with respect to the contractual provision relating to "the transfer of employees from discontinued departments or plants to new plants or departments", that "There is no compulsion that an agreement be reached" (12b);

(b) the statement of Mr. Murray in 1947 repeating this language (10b);

(c) the statement of Union General Counsel Arthur J. Goldberg in 1952, when the Union was requesting the Wage Stabilization Board to direct a change in this contractual language, that the old language "failed to give effect to any of the seniority rights of the employees except as those might be mutually agreed to by the parties at the local level" (15b).

And the contractual provision, so officially interpreted by the Union, remained unchanged.

Then the arbitrator considered a solution to the problem which had been worked out by a Commission of the International Executive Board of the Union. This called for awarding 206 of the estimated 325 jobs at Ambridge to the Etna employees and 119 of the jobs to Ambridge employees, and established procedures for integrating the seniority lists. This solution, Mr. Platt ruled, was the "most appropriate solution of the dispute", and "[i]n actual fact, the Etna employees are granted transfer rights and benefits which, except for the pro-

posed solution, they would not be entitled to under the existing agreement. They have no reason for complaint" (224a-225a).

The award was complied with by all parties and on September 13, 1961, the action in the District Court was dismissed with prejudice (80a). *No appeal was taken from the dismissal* (80a).

On April 23, 1962, the plaintiffs brought the present action on behalf of the class of Armco employees who were members of the same unions, Nos. 1244 and 2592 (4a). The complaint in the present action alleged that the United Steelworkers of America is the exclusive collective bargaining representative, certified by the National Labor Relations Board, for Armco's production, maintenance, and office workers at its plant in Etna (5a). The complaint alleged that Armco had closed its Etna plant and terminated all but 206 of the Etna employees, and that Armco had transferred its operations to its plant in Ambridge (13a-15a). Like the complaint in the earlier action, the complaint referred to the paragraphs in the collective bargaining agreement between the United Steelworkers of America and Armco and the seniority supplement which provided that problems arising out of the transfer of employees from discontinued plants to new plants were matters for which adjustment should be sought between local plant management and local grievence committees (11a-12a).

The complaint alleged that Armco, in breach of the paragraphs in the collective bargaining agreement and the seniority supplement, refused to transfer more than 206 of the Etna employees to Ambridge, and that all the employees had the right to be transferred to the same or

similar jobs in Ambridge (14a-16a). The complaint also alleged that Armco would require not merely the 325 employees it had estimated, but in excess of 1,000 employees, and asserted that the estimate of 325 was made by Armco to induce the United Steelworkers of America to discriminate against the Etna unions (19a-20a). The complaint asked that Armco be ordered to pay compensatory and punitive damages (17a-18a, 21a).

Armco filed a motion to dismiss the complaint, referring to the prior litigation and the arbitration proceedings (55a). The District Court granted the motion to dismiss and entered judgment for the defendant (72a-73a). The Court of Appeals for the Third Circuit affirmed per curiam (p. 60), holding that the judgment in the prior action was *res judicata* as to all issues tendered by the present action. A motion for rehearing was denied (p. 63).

ARGUMENT

I.

There is no question of federal law applicable to this case which has not been settled by this Court. It is thoroughly settled that:

(a) A question put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies.

(b) A collective bargaining representative acting in good faith has continuing authority to negotiate agreements affecting seniority.

A.

Res Judicata

The reason given by the Court of Appeals for dismissing with prejudice the claims of the petitioners was that it sought "a relitigation of the same cause of action that was before the court in the first case and was adjudicated by a decision on the merits" (p. 62). This happened in proceedings in the District Court on September 13, 1961 (80a).

As detailed in the Statement of the Case (pp. 2-3, *supra*), the first action sought to enjoin Armco from employing men at Ambridge to do work at the Ambridge plant on machinery which was to be moved from Etna. The action also sought both compensatory and punitive damages for Armco's alleged breach of its contract with the United Steelworkers of America. The present action seeks both compensatory and punitive damages for Armco's employing some men at Ambridge to do work

at the Ambridge plant on machinery that has been moved from Etna, and claims a right to damages because of Armco's alleged breach of its contract with the United Steelworkers of America.

How many times may the same party litigate the same question in the same court?

The answer is well settled: once!

The most recent authority is, we believe, *United States v. Munsingwear, Inc.*, 340 U. S. 36, 38, which reaffirmed "the classic statement of the rule of res judicata in *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48-49:

> " 'The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.' "

The question in the previous case was whether the members of the local unions at Etna had a "right" to jobs in Ambridge. The District Court ordered the question arbitrated. The arbitrator then considered the very issue involved in the present litigation (206a-207a):

> "Locals 1244 and 2592 maintain that the Inter-Plant Transfer clause of their Agreements guarantees

> Etna employees transfers to Ambridge and the right to exercise their seniority on jobs at the new combination pipe mill and on new jobs which may result from the mill operations. They believe the new mill at Ambridge will perform the same function as the Etna mill, that a substantial portion of Etna's mill equipment and facilities will be moved to Ambridge, and that the same end-product as manufactured at Etna will continue to be manufactured. Therefore, they say, the new mill jobs should go to the displaced Etna workers."

Having considered the issue, the arbitrator decided it (214a):

> "The clause [in the contract] does not give to employees in a discontinued plant any other rights than the right to bargain . . ."

And then the District Court dismissed the action with prejudice and no appeal was taken from the dismissal (80a).

So the specific issue was raised and decided. It does not matter whether the decision was right or wrong, because the Restatement of the Law of Judgment provides in § 45, comment f:

> "If the judgment is erroneous, the unsuccessful party may take steps to have it set aside or reversed in the original proceeding. If he does not do so, or if his attempt to do so is unsuccessful, he cannot thereafter collaterally attack the judgment . . . If the judgment is for the defendant, it operates as a bar to subsequent action by the plaintiff upon the original cause of action, even though the judgment is erroneous."

Argument.

Petitioners seek to escape from the rule of *res judicata* by asserting in their Questions Presented (p. 5) that the District Court in the 1961 proceeding "compelled the local unions" to submit the issue to arbitration. But the local unions were in no sense "compelled". They were ordered to arbitrate, but if they did not like the order they had the right to appeal to the Court of Appeals. Then, after the arbitration proceedings, their complaint was dismissed with prejudice, and if they did not like that order they had the right to appeal to the Court of Appeals. A party cannot simply ignore an order of a court of competent jurisdiction and, a year later, claim that it is not binding because the judgment was wrong. As this Court held in *Rooker v. Fidelity Trust Co.*, 263 U. S. 413, 415:

> "If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication."

Nor are petitioners helped by their claim that Armco misrepresented the number of jobs that would be available at Ambridge (p. 5). It is hard to conceive what motive Armco could have had, although such a misrepresentation is presumably admitted by the motion to dismiss. But the record is clear that any such misrepresentation would be irrelevant — for the reason that the arbitrator held that under the contract the Etna employees were not entitled to any of the jobs at Ambridge. So, whether they were not entitled to 325 jobs or not entitled to 1,000 jobs could make no difference.

The arbitrator considered the contract, the official records of the Steelworkers, and the testimony, including the testimony of the present petitioners Panza and Smith, who claimed that the contract guaranteed a right of transfer from one plant to another. But, in his award, the arbitrator rejected the testimony of Panza and Smith, and held that the contract "certainly cannot be read as guaranteeing a right of transfer" (213a). Then, having decided that the Etna employees had no rights whatever, the arbitrator went on to consider and approve a settlement of the dispute that had been proposed by the International Union against the protests of both the Etna and Ambridge locals. This settlement, based on the company estimate that there would be 325 jobs available, gave 206 jobs to the Etna employees. The arbitrator ruled (225a):

> "In actual fact, the Etna employees are granted transfer rights which, except for the proposed solution, they would not be entitled to under the existing agreements. They have no valid reason for complaint."

These two sentences completely destroy the petitioners' claim of fraud. In the arbitration proceedings the petitioners claimed all the jobs. The arbitrator held that the petitioners were not entitled to any, and that the settlement to which they now object gave them 206 more jobs than they had a right to receive. If a plaintiff sues to recover property and the court rules he has no rights in the property, surely he cannot escape *res judicata* by a claim that the property—to which it has been adjudicated he has no rights—was more valuable than he thought.

B.

Union Authority

The petitioners offer as one of their "Questions Presented" whether "the seniority and other vested rights of employees of one plant of an employer may be bargained away by such employer and an international union" (p. 4). Of course, the phrase "an" international union is incomplete; the petitioners concede that "the" international union, the United Steelworkers of America, had been certified as the exclusive collective bargaining representative (5a).

So the question really is whether the exclusive collective bargaining representative may "bargain away" seniority rights of some of its members and thereby improve the seniority rights of others of its members. This Court has squarely decided that it may do so, at least where the union acts in good faith—and there is nothing in the complaint (1a-54a) suggesting that the International Union acted in bad faith in agreeing to arbitration.

We think that petitioners err in their statement (pp. 40-41) that "this Court has never passed on the following questions: . . . whether such members were bound by the action of the International Union, which had been merely appointed their collective bargaining agent, in agreeing to submit to arbitration the issue of such seniority rights." We believe that this Court has held that such an agent can negotiate, bargain away, or deal in any manner with seniority rights. And to say that the Steelworkers Union was "merely" the bargaining agent is to assume

that you have to be something more than a bargaining agent in order to bargain.

In *Aeronautical Lodge v. Campbell*, 337 U. S. 521, a union member had seniority rights and then went into military service. While he was in military service the union and the employer modified the collective bargaining agreement, and this operated to the detriment of the union member on his return from military service. This Court held that the union had authority to make this agreement, stating (p. 525):

> "It is of the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static."

And in *Ford Motor Co. v. Huffman*, 345 U. S. 330, another union member had his seniority status adversely affected by a modification of seniority provisions while he was in military service. This Court approved, stating (pp. 338-339):

> "Inevitably differences arise in the matter and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. . . .
>
> "The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsibility."

But the petitioners seek to limit the authority of the exclusive collective bargaining agent, the United Steelworkers of America. They do this by referring to a provision of its constitution which says that no officer has authority to take action which constitutes a "breach" of any collective bargaining agreement (p. 16). From this they argue that the international had no authority to "modify" a collective bargaining agreement. The argument is fallacious: the authority of a union to represent employees is not a one-shot proposition which is terminated when the agreement is signed. And the same constitution recognizes that the members have delegated to the international union the power to act exclusively to represent them in *all* matters arising out of the employer-employee relationship (pp. 55-56). "All" means "all", and, contrary to the petitioners' unsupported assertion (p. 17), it does mean carte blanche authority.

II.

There is no conflict with the decisions of this Court in the American Manufacturing, Warrior, and Enterprise cases. Under a collective bargaining contract providing for arbitration, any matter, not specifically excluded, is arbitrable.

Petitioners contend that the grievance which was here arbitrated in 1961 was not arbitrable. And they say (p. 29) that the decision of the Court of Appeals, which approved the arbitration proceeding, is in conflict with decisions of this Court. We submit that the very decisions they cite show that the matter here involved was clearly arbitrable.

The most significant case is *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, where this Court held (pp. 584-585):

> "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad."

In the present case the arbitration clause covered any unsettled "complaint" (25a), a word which could hardly be broader, and there was no exclusion clause.

United Steelworkers v. American Manufacturing Co., 363 U. S. 564, held that even seemingly frivolous claims were arbitrable. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593, held that courts should not overrule an arbitrator because their interpretation of a contract was different from his. We are

unable to see how the holding of the Court of Appeals in the present case is in conflict with any of these decisions. And the most recent decision of this Court on the subject, *Drake Bakeries v. Local 50*, 370 U. S. 254, 259, holds that to avoid arbitration even a matter "so fundamental and so basic" as a strike in breach of contract must be "excluded from the comprehensive language . . . if the parties so intended."

Petitioners argue (p. 30) that the definition of "grievance" in the union contract is narrower than the portion quoted by the District Court. They do not dispute that the matter involved "the interpretation or application of, or compliance with, the provisions of this agreement." But they say that a "grievance", as defined in Section 6.3, is *limited* to a complaint which has not been settled as a result of the discussions required by Subsection 6.2" (p. 32). One complete answer is that the arbitration clause in the *American Manufacturing* case covered grievences "which are not adjusted as herein provided"; surely there is no difference between the *American Manufacturing* word "adjusted" and the Armco word "settled". Another complete answer is that petitioner Orest Panza, with 34 other employees, recognized the propriety of the grievance-and-arbitration procedure in this matter by filing a "grievance" on April 1, 1961, in which he made complaint of the very things here involved (60a-61a). Another complete answer is that not every "grievance" had to be discussed with a foreman under Section 6.2; grievances involving more than one department go directly to the works manager under Section 6.4133 (26a). And a final answer is that Section 6.47 provides that "Notwithstanding the procedures herein provided, any griev-

ance may be submitted to arbitration at any time by agreement of the parties to this Agreement." (31a)

The quotations given by the petitioners (pp. 34-35) from arbitration clauses in cases before this Court do not, we submit, show that the Armco contract provided for a lesser amount of arbitration. The clause in *Drake Bakeries, Inc. v. Local 50;* 370 U. S. 254, covered "complaints, disputes or grievances"; here we have a "grievance" which originates in a "complaint." We are unable to see the difference. And the petitioners say (p. 35) that "the parties cannot have intended to arbitrate so fundamental a matter." But this Court in *Drake Bakeries* held that a dispute is arbitrable no matter how "fundamental", exactly the word used by the petitioners.

Further, the petitioners are wrong when they assert (p. 37) that neither they nor the local unions agreed to or participated in the arbitration proceedings. The facts, as found by both the District Court (pp. 56-57) and the Court of Appeals (p. 61), are exactly to the contrary. The record is full of an agreement to arbitrate and a participation in the arbitration:

1. The agreement to arbitrate was executed by the International Union of Steelworkers (176a), which the petitioners allege in their complaint was the exclusive collective bargaining agent (5a). The petitioners comment (p. 40) that "it is interesting to note" that the agreement was signed for the International Union by its general counsel, Feller, Bredhoff & Anker. Such an interesting note does not negate the authority of the general counsel.

2. The agreement to arbitrate was executed by the presidents of the two local unions at Etna of which the petitioners are members (176a). The petitioners assert (p. 39) that on March 16, 1961, the local unions objected to arbitration. But on April 20, 1961, they signed the agreement (176a). The petitioners' statement (p. 40) that at a later meeting the union officers told the members "they had been forced to submit to arbitration" is not supported by anything in the record.

3. On April 1, 1961, petitioner Orest Panza, with 34 other employees, filed a grievance, complaining of the matter here involved, and closed the grievance with the words "We insist on arbitration" (60a-61a).

4. In the District Court on April 10, 1961, J. Wray Connolly, Esq., appeared and stated that he represented 256 of the same Etna employees whom the petitioners now seek to represent (144a). He told the District Court that he felt that the matter was one for arbitration (141a). The petitioners have not even attempted to repudiate the authority of Mr. Connolly.

5. The Etna local unions appeared at the arbitration proceedings on May 18, 1961, through their attorney (177a). He said that the matter was properly before the arbitrator (16b). He presented the testimony of numerous witnesses and he cross-examined opposing witnesses. And among the witnesses whose testimony the union presented were two of the present plaintiffs, Orest Panza and Frank Smith.

Aside from the general rule as to arbitrability established by the decisions of this Court, any one of these five events would have been a sufficient agreement to arbitrate. We submit that in the aggregate they are irresistible.

III.

There is no conflict with the decision of another Court of Appeals on the same matter. In the Zdanok case, the Second Circuit was concerned only with construing a particular contract, and agreed that a union can bargain away employees' seniority rights.

The petitioners ask that the writ be allowed because of a conflict with the Second Circuit in *Zdanok v. Glidden Co.*, 288 F. 2d 99, and with the Third Circuit itself in *Metal Polishers v. Viking Equipment Co.*, 278 F. 2d 142. Of course a conflict between the Third Circuit and the Third Circuit itself, if such existed, would not be grounds for allowance of the writ under Supreme Court Rule 19.1(b).

It is to be noted that petitioners assert that the Sixth Circuit ruled against them in *Oddie v. Ross Gear & Tool Co.*, 305 F. 2d 143. Oddie petitioned for a writ of certiorari, asserting a conflict with *Zdanok* and *Metal Polishers*. The writ was denied: 371 U. S. 941. There is no conflict, for two reasons.

First, as to a right of transfer:

Zdanok did not hold that under every collective bargaining contract the employees of a closed plant have the right to transfer to another plant. It held that there was such a right as a "rational construction of the contract" involved in the particular case: 288 F. 2d at 104.

Metal Polishers did not hold that there is always a right of transfer. It held there was a right in the particular case because it disagreed "with the district

judge in his interpretation of the contract": 278 F. 2d at 143.

Oddie did not hold that there is never a right of transfer. It held that the *Zdanok* agreement was "materially different from the agreement in the present case" and that the *Metal Polishers* dispute arose out of a "collective bargaining agreement which, of course, is vitally different from the situation which we are considering": 305 F. 2d at 149.

And the Court of Appeals in the present case did not hold that there is never a right of transfer. It noted that the arbitrator in the first proceeding had rejected the claim that the employer had violated the collective bargaining agreement, and that then the district court had dismissed the action with prejudice. It held that the interest of the petitioners was concluded by the dismissal of the first action with prejudice (p. 62). As to whether there would have been a right of transfer had it not been for *res judicata*, the Court of Appeals both held and said nothing at all.

Secondly, as to the right of a union to bargain away employees' seniority rights:

Petitioners say (p. 28) that *Zdanok* held that "an employer cannot unilaterally terminate the rights of employees." But the respondent here did not act unilaterally; it participated in arbitration proceedings with the exclusive collective bargaining agent. Though the petitioners argue that the bargaining agent had no power to bargain (p. 24), their reliance on *Zdanok* fails because the Second Circuit ruled (288 F. 2d at 103

> "Of course the employee owning the right, or his authorized union agent, could bargain away the employee's right."

To the same effect is the holding of the Sixth Circuit in *Oddie v. Ross Gear & Tool Co.*, 305 F. 2d 143, cert. den. 371 U. S. 941, where the Court recognized a general principle that employees have a right of transfer but denied it in the particular case because (p. 149):

> "It appears to be well settled that such rights of the individual employees can be bargained away by the Union representing them in collective bargaining. Elder v. New York Central R. Co., 152 F. 2d 361, C.A. 6th; System Federation No. 59, etc. v. Louisiana & A. Ry. Co., 119 F. 2d 509, 515, C. A. 5th. It was so recognized in Zdanok v. Glidden Co., supra, 288 F. 2d 99, 103, C. A. 2nd."

Zdanok, therefore, presents no conflict with the decision of the Court of Appeals for the Third Circuit in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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